In the Supreme Court of the United States

October Term, 1979

No. 79-1250

Supreme Court, U. S.
FILED
APR 1 1980
MICHAEL RODAK, JR., CLERK

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

ASHLAND OIL, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

*GERALD SAWATZKY
FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

JAY W. ELSTON
FULBRIGHT & JAWORSKI
800 Bank of the Southwest Building
Houston, Texas 77002

JOHN M. IMEL
MOYERS, MARTIN, CONWAY, SANTEE & IMEL
320 South Boston Building
Suite 920
Tulsa, Oklahoma 74103

ARLOE W. MAYNE
Ashland Oil, Inc.
1409 Winchester Avenue
P.O. Box 391
Ashland, Kentucky 41101
Attorneys for Respondent Ashland Oil, Inc.

March 28, 1980

*Counsel upon whom service is to be made.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

OPINIONS BELOW 1

QUESTION PRESENTED 2

STATUTES INVOLVED 2

STATEMENT 3

Historical Background—Legislative History 6

The Helium Litigation 10

ARGUMENT 14

CONCLUSION 19

APPENDIX 21

Index to Citations

CASES

Ashland Oil & Refining Company v. FPC, 421 F.2d 17 (6th Cir.) 12

Ashland Oil, Inc. v. Phillips Petroleum Company, 554 F.2d 381 (10th Cir., 1977), cert. denied, 434 U.S. 921, 968 ..... 2, 14

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) 4

Carpenter v. Josey Oil Co., 26 F.2d 442 (8th Cir.) 16

Clearfield Trust Co. v. United States, 318 U.S. 363 (1934) 14

Cort v. Ash, 422 U.S. 66 (1975) 17

Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir., 1971), cert. denied, 404 U.S. 951, 1063 ..... 1, 2, 3, 4, 11, 14, 15, 16, 17, 18

Phillips Petroleum Company v. Ashland Oil & Refining Company, 40 FPC 390 (1968) 12, 16, 17, 18

Phillips Petroleum Company v. Texaco, 415 U.S. 125 (1974) 11, 15, 16, 17

Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, (1954) 6
Phoenix Lumber Co. v. Houston Water Co., 94 Tex. 456, 61 S.W. 707 (1901) 16
Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942) 14
Texas Oil & Gas Company v. Vela, 429 S.W.2d 866, 871 (Tex. Comm. App. 1926) 16
United States v. County of Allegheny, 322 U.S. 174 (1944) 14
United States v. Turtle Mtn. Band of Chippewa Indians, 612 F.2d 517 (Ct. Cl. 1979) 3

OTHER AUTHORITIES

Section 11 of the Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. §167, §167i, §167m 2, 7, 8, 10, 11, 18
Section 4(a), (b), (c) of the Natural Gas Act, 52 Stat. 82, 76 Stat. 72, 15 U.S.C. §717c 2, 11
Hearings Before Subcommittee on Mines and Mining, pp. 38-39, 103, 105, March, 1960 9
41 C.F.R. §§1-3.403-2 and 1-15.205-7 (1961) 10

In the Supreme Court of the United States

October Term, 1979

No. 79-1250

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

ASHLAND OIL, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions delivered in the courts below (A. 91a, 54a) are reported in 607 F.2d 335 (10th Cir., 1979), and 463 F.Supp. 619 (N.D. Okla., 1978). These proceedings, however, did not involve the question presented by petitioner, but rather followed an earlier partial affirmance and remand on other points (A. 20a) reported in 554 F.2d 381 (10th Cir., 1977), cert. denied, 434 U.S. 921, 968, which was a review of the initial 1973 district court decision (A. 1a) reported at 364 F.Supp. 6 (N.D. Okla., 1973). These earlier decisions, in turn, simply followed the definitive holding of a related case, *Northern Natural Gas Co. v. Grounds,* 441 F.2d 704 (10th Cir., 1971), cert. denied, 404 U.S. 951, 1063, to which both petitioner and respondent were parties.

The latter decision is not reproduced in the Appendix to the Petition.

QUESTION PRESENTED

Should this Court review the determination made in *Northern Natural Gas Co. v. Grounds,* 441 F.2d 704 (10th Cir., 1971), cert. denied, 404 U.S. 951, 1063, that a helium extractor's payment to the gas producer of a rate for natural gas, filed with and approved by the Federal Power Commission as authorized by the Natural Gas Act, was not a payment for helium commingled in the natural gas, when:

(a) Section 11 of the Helium Act provides that rates authorized by the Natural Gas Act are not applicable to helium commingled in the natural gas;

(b) This Court denied certiorari in *Grounds* on January 24, 1972, on two petitions raising the same arguments; and later denied separate petitions for certiorari by petitioner and the United States raising the same contentions as to an earlier decision in this case, 554 F.2d 381, cert. denied, 434 U.S. 921, 968 (1977); and

(c) The decision in *Grounds* was demonstrably correct, and has been approved by all judges of the Tenth Circuit without dissent?

STATUTES INVOLVED

Subsections (a), (b), and (c) of Section 4 of the Natural Gas Act, 52 Stat. 82, 76 Stat. 72, 15 U.S.C. §717c; and Section 11 of the Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. §167i, are reprinted in the Appendix to this brief, *infra*.

STATEMENT

This fifth petition for a writ of certiorari filed since 1971, by parties required to pay for the rare commodity, helium, obtained by them from producers such as Ashland who supply it, presents the same spurious argument made in each of the previous four petitions. Two of the petitions were filed by petitioner and the United States seeking review of the 1977 *en banc* decision by the court of appeals in this case.

The other two petitions were filed in 1971 by other helium extractors seeking review of *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (10th Cir.), cert. denied, 404 U.S. 1063, which completely disposed of the issue of liability for helium payment, and remanded to the district court solely to ascertain the value of the helium for which judgment should be entered. Both Phillips and Ashland were named parties to those class actions in one capacity or another, taking opposing sides on the liability phase.

Thus, although the liability judgment was "interlocutory" in the sense that the amount of recovery was not fixed, the liability was "final" so far as the Tenth Circuit was concerned. The lengthy district court trial on the liability phase had been completed in 1968, and only the valuation, or damage, phase had been reserved.[1] There was no reason, flowing from the remand of the damage phase, to defer potential review by this Court of the liability phase, as each of the petitions made clear. There was

---

1. The liability phase consumed 40 days of trial, and included 1,611 exhibits. The index to the record on appeal was itself 234 legal size pages in length.

A judgment following trial and appeal of the severed liability phase, which remands only the valuation phase, is considered to be "final" in later appeals from the valuation proceedings. *U.S. v. Turtle Mtn. Band of Chippewa Indians*, 612 F.2d 517, 520 (Ct. Cl. 1979).

no basis suggested by any party for deferring review until a later "final" judgment fixing the amount of recovery. The remand of the damage phase, therefore, was unlike those cases in which a remand for further district court findings may affect the issue sought to be reviewed, or additional trial affecting the issue is ordered, as in *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967), cited by petitioner, pp. 20-21.

Since this Court's denial of the two petitions in *Grounds* in January, 1972, the following protracted proceedings on the valuation, or damage, phase have ensued:

1973—Discovery and trial in the Northern District of Oklahoma in this case.

1974—Appellate proceedings on appeals from the Oklahoma case; Discovery and trial in the District of Kansas in the *Grounds* case.

1975—Decision of a Tenth Circuit panel affirming the valuation issue in the Oklahoma case, in which appeals all parties to the Kansas case had participated as *amici curiae*.

1976—Appellate proceedings on appeals from the *Grounds* case; heard by the court *en banc*, consolidated with a rehearing *en banc* granted in this case.

1977—*En banc* decision on rehearing affirming the major aspects of the "work-back" valuation method applied by the district court in its 1973 decision in this case, but remanding limited issues for further evidence.

Certiorari petitions filed by Phillips and by the United States were denied.

1978—Trial on remanded issues in this case in the Northern District of Oklahoma, after which the district court held that its prior 1973 rejection of the base contract price as an element of the valuation was "erroneous" although the appellate court had affirmed that aspect of its prior decision.

1979—Appellate proceedings, and decision affirming the district court's $3 per m.c.f. value, as had been advocated by the single dissent on the valuation question in the 1977 *en banc* decision. The appellate court declined to apply the law of the case decided in 1977 by ignoring, in its summary opinion, Ashland's principal point on the appeal.

There remains, we trust, a strong public policy supporting finality in judicial proceedings, a policy designed to minimize delay; to promote economy in time, expense and effort by preventing relitigation of decided issues and by bringing litigation to prompt, final conclusion. Since Ashland had already expended far more costs in the proceedings below in this case than the amount of its reduced judgment as approved by the court of appeals, the principle of finality is of more than academic interest to it, as noted in more detail in its own petition to this Court in No. 79-1241.

On this ground alone, Phillips' petition should be denied.[2]

---

2. After denial of its last petition (No. 77-221) seeking review of the 1977 *en banc* decision, the judgment affirming Phillips' liability was entered in the district court. Phillips did not there renew any claim of nonliability, did not claim it as an issue in the pretrial order, and admitted liability in its requested findings and conclusions. (RII, Vol. I, 62-103). It

(Continued on following page)

Historical Background—Legislative History

In 1945 and 1953 Ashland's predecessor contracted to sell natural gas from various Texas gas wells to Phillips. The contracts were entered into by Phillips so that it could resell the gas, and gas from many other wells, to Michigan Wisconsin Pipe Line Company. At those dates, no federal price regulation affected those sales or resales. Gas from the Ashland wells was to escalate in price, under the contract provisions, with the expected rise in the unregulated price of Phillips' resales to Michigan Wisconsin.

In *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672 (1954), Phillips' resales of this gas were held subject to price regulation under the Natural Gas Act, as were all producer sales for resale in interstate commerce, including the sales from Ashland wells. The ensuing FPC rate regulation directly limited the rates received by Phillips from Michigan Wisconsin, and thus the rates for the sale of natural gas by Ashland to Phillips.

During the middle and late 1950's, coincident with the technological explosion in science and industry, demand for helium rose spectacularly for numerous indispensable civilian and military uses. Ninety-nine percent of the

---

Footnote continued—

[illegible] a general appeal from the money judgment, which judgment was in an amount substantially less than it had admitted was due (RII, Vol. I, 81-82), and first sought to renew the liability issue on appeal by a short statement in its appellate brief, but did not orally argue it. Only Ashland sought rehearing of the appellate decision approving the drastic reduction in its judgment, occasioned by a departure from the earlier decisions in its favor on the valuation issue. Phillips relies on Ashland's petition for rehearing affecting only the valuation issue to extend its time for filing its present petition in this Court. If jurisdiction of Phillips' petition exists here, under that record, it rests on very thin ice.

Citations "RI" and "RII" are to the printed Appendices in the court of appeals for the original 1973 trial, and 1978 evidentiary hearing, respectively.

free world's native helium resources were contained in the Hugoton-Panhandle Gas Field area of Southwestern Kansas, Western Oklahoma and Northwestern Texas.

By 1958, the United States Department of Interior had made comprehensive studies demonstrating that helium from this area would be required for governmental and commercial needs. (RI, Ex. Vol. III, 556). Unless the helium were extracted for later beneficial use, it would be irretrievably lost as the gas field became depleted. In the latter event, helium demand could only be supplied from a few isolated sources at production costs up to $350.00 per m.c.f. of helium, with the remainder obtainable only from the trace of helium in the atmosphere at a cost then estimated to be $10,000 per m.c.f. (RI, Ex. Vol. VI, 1131, Ex. Vol. II, 296).

Thus, the Interior Department proposed to Congress that amendments be made to the existing Helium Act, to enable the United States to extract helium from the existing inexpensive sources for future sale and use. From extensive committee hearings on the proposed amendments, Congress was fully aware that the natural gas containing the helium was regulated as to rates and transportation pursuant to the Natural Gas Act.

The language of Section 11 of the Helium Act Amendments (50 U.S.C. §167i) excluding helium from rate regulation under the Natural Gas Act, was carefully worked out by the Senate committee together with the Federal Power Commission. (RI, Ex. Vol. V, 919). The legislative history shows without question that the statute states precisely what was intended—that the provisions of the Natural Gas Act are not applicable to the sale of helium "either prior to or subsequent to" the extraction of helium from the gas stream. (441 F.2d at 718). The necessary consequence was to make clear that FPC rates al-

lowed for natural gas constituted payment only for the jurisdictional natural gas, and could not actually nor legally be considered a payment for the unregulated, nonjurisdictional helium. It was recognized that, because of the emergent high demand for current and future use, helium extracted for such use had acquired "great value". (441 F.2d at 706).

The value question was explored in House subcommittee hearings discussing Section 1 of the proposed amendments (ultimately §3), providing for helium acquisition and eminent domain powers. As proposed by the Interior Department, that section would have made no mention of any payment for the value of helium as a commodity. (RI, Ex. Vol. IV, 703, 725, 817, 829). Congressman Rogers, Chairman of the Subcommittee on Mining, however, presented a revised version on this point which was ultimately enacted over the continuing objection of Interior. (RI, Ex. Vol. IV, 711-719, 821). The enacted revision provided that if the helium could not be obtained by contract for "market value", that it would be obtained by condemnation, "the just compensation for such condemnation to be measured by terms and prices determined to be *commensurate* with the fair market value. . . ." (50 U.S.C. §167a(a)(2)). (Our emphasis).

The foregoing version was approved after Chairman Rogers, in an interchange concerning market value with Undersecretary Bennett, made clear that the helium value should inure to the benefit of those having interests in the helium, back to the initial interest holders, the royalty owners from whose lands the helium was produced with the natural gas. (RI, Ex. Vol. IV, 827). The revision was enacted despite express objections of the Interior Department (RI, Ex. Vol. IV, 829), which in this litigation has continued to object to payment of helium value to those supplying the helium to the extracting plants.

It was also developed in subcommittee hearings that "there is no such thing as a true competitive market for helium" (RI, Ex. Vol. V, 867), and thus there was not then a market price, but merely an arbitrary price set by the government under its then existing monopoly. The only suggestion made as to the means for determining a value "commensurate with fair market value" was to consider the value of helium extracted by industry and sold in a competitive market, in connection with the costs incurred in its extraction. (Hearings Before Subcommittee on Mines and Mining, pp. 38-39, 103, 105, March, 1960). Indeed, the Department of Interior was well aware that the appropriate method for determining value of helium prior to extraction from the gas stream was the "value-less-expense" or work-back method, which was an established principle in the gas industry for ascertaining value of separate products extracted from gas streams. (RI, Ex. Vol. II, p. 298, Vol. III, 634-635). This method starts with an established competitive market value of the extracted, marketable product, based on actual sales for beneficial use, and deducts extraction costs including a fair return or profit for the extraction function, to arrive at value prior to extraction. (A. 30a-31a, 554 F.2d at 387-388).

When, therefore, in 1961, the Interior Department entered into four long-term helium conservation contracts, one with Phillips, the price provisions recognized the potential right of producers, such as Ashland, and the royalty owners, to receive a value for the helium they supplied. (A. 5a). The base contract prices, averaging $11 to $12 per m.c.f., were themselves fixed without relationship to market value. (554 F.2d at 384, 389). But a special price escalation clause was included by which, if Phillips was required to pay more than about $3 per m.c.f. to third parties for the helium supply, the government would pay

an additional price to Phillips for all amounts above the $3 owed to third parties. (RI, Vol. I, 91-95). This provision thus complied with 41 C.F.R. §§1-3.403-2 and 1-15.205-7 (1961) pertaining to contingent price escalation provisions, which required that the base contract price not include any amount for the contingency for additional price payments.

The decision of the government to enter into the conservation contracts with these companies was itself a practical one, because it knew that condemnation of thousands of producer and royalty interests would be time consuming and would unduly delay the entire conservation program. (RI, Ex. Vol. II, 478, Ex. Vol. III, 491, 556).

Section 15 of the Helium Act Amendments (50 U.S.C. §167m) also expressed the intent of Congress to encourage individual enterprise in helium development. (441 F.2d at 718). As a consequence several private helium plants were built in the 1960's for supply of the current market demands, resulting in a highly competitive price war, depressing prices as low as $20 per m.c.f., wholesale, F.O.B. at the helium plants. These plants were located on gas streams which either have already been depleted, resulting in plant closure, or will soon be depleted.

Upon further depletion of the present helium reserves, the helium acquired by the government will be purified and sold so as to recover all acquisition and storage costs, at no ultimate cost to the taxpayers. (RI, Vol. III, 650; 50 U.S.C. §167d).

The Helium Litigation

In 1963, the three other helium conservation contractors filed federal interpleader class action suits in Kansas to determine the helium liability and value questions. Both Phillips and Ashland were named parties to some

of these consolidated suits, and took opposing stands on the liability issue. In *Northern Natural Gas Company v. Grounds,* 441 F.2d 704 (10th Cir., 1971), cert. denied, 404 U.S. 951, 1063, the helium extractors were held liable to producers for the helium value, and the producers in turn were held obligated to pay fractional royalties to the landowner-royalty class members. Since the helium extractors had paid only federally regulated rates for natural gas, pursuant to the Natural Gas Act, and these filed rates superseded contract price provisions and contract price escalation provisions, and because those rates could not legally apply to helium in the natural gas, as expressly provided by Section 11 of the Helium Act Amendments, it was apparent that payment had not been made for helium.

The court of appeals also considered and followed this Court's decisions holding that the filed rate for the commodity or service covered is the only lawful rate, and no deviation from it is legal. (441 F.2d at 720). Moreover, Section 4(b) of the Natural Gas Act, 15 U.S.C. §717c (b) forbids "any undue preference or advantage". If a natural gas company paying for jurisdictional natural gas under a filed rate, receives in addition a valuable unregulated commodity for no additional payment, there would exist an illegal deviation and preference to that company.

This Court construed the *Grounds* holding with reference to a question of federal subject matter jurisdiction, in *Phillips Petroleum Company v. Texaco,* 415 U.S. 125 (1974):

> "The *Grounds* case simply held that payment for natural gas at rates established or permitted by the Commission under the authority of the Natural Gas Act will not be regarded as payment for the helium con-

> stituent and cannot be asserted as a defense to a suit for the recovery of the value of that helium." (415 U.S. at 128).

But this Court was careful to note that the cause of action was not a federal claim implied from the federal statute, but rather that the right of recovery itself was "in quantum meruit, whose source is state law and not federal law." (415 U.S. at 129). The Natural Gas Act and Helium Act Amendments merely bar Phillips' defense of payment. (415 U.S. at 129).

In the meantime, this case had been filed by Ashland against Phillips in 1967, after clarification of pleadings in the Kansas action. Ashland sought recovery for the value of its helium, and also sought recovery of over half a million dollars for contract rate increases for natural gas based on increases allowed by the FPC to Phillips on its resale to Michigan Wisconsin. Ashland had not filed with the FPC for these increases, but sought to rely on Phillips' own filings or alleged obligation to file. Phillips applied to the FPC for an order that Ashland's own filings for natural gas rates were conclusive. The FPC sustained its position, thereby enabling Phillips to pocket the half million dollars owed under the contract. The FPC, however, made it crystal clear that none of the natural gas rates allowed by it were applicable to the helium in the gas because "Under Section 11 of the Helium Act Amendments of 1960, the Commission has no jurisdiction over the price of helium." *Phillips Petroleum Company v. Ashland Oil & Refining Company,* 40 FPC 390 (1968), affirmed in *Ashland Oil & Refining Company v. FPC,* 421 F.2d 17 (6th Cir.).

Thus, the valuation of Ashland's helium was tried in the Oklahoma federal court in 1973, and was the subject of the ensuing proceedings as described earlier herein.

After the court of appeals in 1975 affirmed the district court's work-back valuation method,[3] it granted a rehearing *en banc,* to be consolidated with the valuation phase appeals from the Kansas litigation in the *Grounds* case (in which the Kansas federal district court had rejected the work-back method). Upon a consolidated appellate record, the *en banc* decision in this case was handed down in 1977, affirming the major aspects of the Oklahoma federal court's work-back valuation method, and rejecting the base contract price as an element in the valuation. Because Phillips and the government had complained on appeal that the $20 selling price of marketable helium used in the method had not been documented by evidence of specific sales, the court remanded for additional evidence on that point, and as to other relatively minor expense items utilized in the valuation method.

But the court of appeals did not, and has not, decided the second round of appeals in *Grounds* involving the valuation phase. Since the purpose of the consolidated appellate proceedings on a consolidated record in this case and the Kansas cases, was to arrive at a consistent result, it is readily apparent that the court in its 1977 *en banc* opinion decided and remanded the limited issues in this Oklahoma case, because it agreed with the valuation method of that district court, and obviously disagreed with the Kansas district court. But when the Oklahoma district court in 1978 decided that its 1973 decision was "erroneous" in rejecting the base contract price as an element in the valuation, despite the appellate affirmance of that aspect, the decision caused immeasurable confusion.

Rather than enforcing adherence to the prior *en banc* decision, therefore, the court of appeals, in its 1979 de-

---

3. This unpublished opinion is found in the Appendix to Ashland's Petition in No. 79-1241, p. 43a.

cision threw up its hands and summarily affirmed, without discussion of Ashland's major complaint on appeal.

None of these latest developments during the valuation phase, however, concerned the liability question now raised again by Phillips.[4]

ARGUMENT

Northern Natural Gas Company v. Grounds, 441 F.2d 704 (10th Cir., 1971), cert. denied, 404 U.S. 951, 1063 was decided based upon a massive record, including all types of gas purchase contracts and contract prices, after extensive briefing and extended oral argument. This Court denied petitions making the same arguments, which were based on the same type of contract as Phillips relies on here, and on all other types of natural gas contracts. The court of appeals, sitting *en banc* on rehearing, correctly rejected the same argument in *Ashland Oil, Inc. v. Phillips Petroleum Company*, 554 F.2d 381 (10th Cir., 1977), cert. denied, 434 U.S. 921, 968, and, again, certiorari was denied on petitions making the same argument concerning the same facts.[5]

---

4. It is the permitted relitigation of the principal helium valuation factor in the 1978 "evidentiary hearing" which is the subject of Ashland's petition to this Court in No. 79-1241.

5. Aside from Phillips' liability on Ashland's local *quantum meruit* claim for helium value, the *en banc* opinion effectuated this Court's required application of federal law to the peripheral issues of prejudgment interest, limitations, and attorneys' fees, under *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1934); *United States v. County of Allegheny*, 322 U.S. 174 (1944); and *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942).

Phillips' complaint of that aspect of the holding in its 1977 petition (No. 77-221) was opposed by the United States in its petition. (No. 77-530). Phillips' present petition fails to explain that aspect of the case, and fails to recognize that it is completely consistent with Ashland's *quantum meruit* right of recovery under local law. That aspect related only to the valuation phase, not the liability issue to which the present petition is confined.

The liability issue had been completely and separately tried in the district court, and was completely disposed of in *Grounds*. The valuation remand in 1971, thus, did not relate at all to that issue. *Grounds* denied the precise defense of payment which is now pursued by Phillips in its petition, as noted in *Phillips Petroleum Company v. Texaco*, 415 U.S. 125 (1974).[6] Since four petitions to this Court complaining of *Grounds* have already been denied since 1971, this fifth petition should also be denied, particularly in view of the extensive valuation proceedings since 1972 which have been premised on the liability holding in *Grounds*.

Moreover, the decision in *Grounds*, that those owning and supplying valuable helium are entitled to payment for what they supply, is an issue confined to the helium litigation in the Tenth Circuit. It is of limited significance, in that the issue is not likely to recur in future litigation.

The strained attempt by Phillips to compare *Grounds* with this Court's decisions on whether private federal causes of action may be implied from federal statutes (Petition, pp. 18-19) is obviously fallacious, because the causes of action in *Grounds* were in *quantum meruit* under "state law not federal law." *Phillips Petroleum Company v. Texaco*, 415 U.S. at 129.[7]

---

6. The court of appeals in *Grounds* found it unnecessary to consider other theories of recovery argued by producers, in view of its holding in this respect. (441 F.2d at 722). It was thus conceded by the United States in its 1977 Petition in this Court that even if *Grounds* were reviewed and reversed, it would require a remand for further litigation over liability. (Petition, p. 22, No. 77-530).

7. Phillips' "question presented" (Petition, p. 2), designed to fit its argument, is thus misleading. The *quantum meruit* right of recovery is not a federal right implied from the federal statutes. Rather it is a state, or local, claim arising from the *fact* that the federal rate for natural gas does not constitute a payment for helium, which is specifically and jurisdictionally excluded from that rate. (415 U.S. at 128-129).

Phillips' assertion that Texas law is to the contrary is devoid of merit. It cites in support only *Phoenix Lumber Co. v. Houston Water Co.*, 94 Tex. 456, 61 S.W. 707 (1901), which merely applied the ordinary rule that an express contract excludes an implied contract on the same subject. This rule is not applicable to an action in *quantum meruit*, or quasi-contract, which refers to that class of obligations "Imposed by law, without regard to the intention or assent of the parties bound, for reasons dictated by reason and justice." *Carpenter v. Josey Oil Co.*, 26 F.2d 442 (8th Cir.).[8]

When governmental rate regulation confines the applicability of a contract price, the rate paid and what it covers must necessarily comply with the regulation. That is why an FPC rate for natural gas does not constitute a payment for nonjurisdictional helium, as this Court recognized in construing the *Grounds* decision, in *Texaco*, 415 U.S. at 128. That is also why the FPC has carefully refrained from dealing with helium in the gas, which helium is not within its jurisdiction. *Phillips Petroleum Company v. Ashland Oil & Refining Co.*, 40 FPC 390 (1968).

Thus, this case does not present the question whether a federal statute intends "to create a private right" of recovery for helium. (Petition, p. 19). The federal statutes merely confine natural gas rates to the natural gas, and provide that these rates do not apply to provide payment for commingled helium. This congressional intent is unarguably clear and specific. As held in *Grounds*, payment

---

8. Phillips also errs by reading *Grounds* to have held that title to helium passed to Phillips. (Petition, pp. 4, 11). The long-term gas contracts were executory, so that sales occur only when gas is physically delivered. *Texas Oil & Gas Company v. Vela*, 429 S.W.2d 866, 871 (Tex. Comm. App., 1926). Absent payment for helium, the "title fails. . . ." *Grounds*, 441 F.2d at 723. Payment of FPC rates for natural gas is not payment for the helium.

of these rates "will not be regarded as payment for the helium constituent and cannot be asserted as a defense. . . ." by Phillips. *Phillips Petroleum Company v. Texaco,* 415 U.S. 125, 128 (1974). The payment required under the local or state claim in *quantum meruit* is not, thus, a claim inferred from federal law. Cf., *Cort v. Ash,* 422 U.S. 66, 78 (1975).

There is no contract provision between Ashland and Phillips that specifies a payment for commingled helium. The contracts, filed as FPC rate schedules, merely provide a price per m.c.f. for the natural gas. Thus, whether the FPC (now FERC) allows that stated price, or a different price, as a natural gas rate, the payment of that rate is clearly not for helium. To then allow Phillips to have valuable helium without payment would be "startling", to use the court's language in *Grounds.* (441 F.2d at 719).

Phillips, in reality, is attempting to circumvent the keystone of federal rate regulation, this Court's long-standing filed rate doctrine, that the legal rate applies only to what the law specifies. This Court's decisions expounding that doctrine were recognized and applied by *Grounds* (441 F.2d at 720), as well as by the FPC, *Phillips Petroleum Company v. Ashland Oil & Refining Company,* 40 FPC 390 (1968), affirmed, 421 F.2d 17 (6th Cir.), in holding that federal natural gas rates do not apply to Ashland's helium. *Phillips Petroleum Company v. Texaco,* 415 U.S. 125 (1974) held that this result did not give rise to a federal right implied from the statutes, but rather merely precluded a defense of payment in the *quantum meruit* state, or local, cause of action for recovery of helium value.

We have noted that Ashland's contract prices are directly tied to increases in rates obtained by Phillips from Michigan Wisconsin Pipeline Company to whom it resells

the natural gas. Phillips' rates to that purchaser are directly limited by federal rate regulation, thus similarly limiting Ashland's rates, which are also filed with and governed by the federal commission.

The stubborn fact that Ashland's FPC filed rates for natural gas do not constitute payment for helium is also vividly illustrated by the FPC proceedings which were an outgrowth of this very case, as described in our Statement. *Phillips Petroleum Company v. Ashland Oil & Refining Company*, 40 FPC 390. Ashland was held not entitled to collect from Phillips over one-half million dollars in admitted deficiencies in payments below the contract price because an FPC filing for the increase was not promptly accomplished. Significantly, the FPC referred to this Court's decisions on the federal filed rate doctrine (followed later in *Grounds*), and recognized that "under Section 11 of the Helium Act Amendments of 1960, the Commission has no jurisdiction over the price of helium."

Phillips is attempting to limit Section 11 of the Helium Act to a discriminatory statute for the private benefit of the helium extractors, contrary to the terms of the statute, and contrary to the intent of Congress.

In essence, therefore, Phillips is attempting to obtain judicial repeal of Section 11 of the Helium Act, and to substitute for it a judicial judgment that commingled helium should be subject to the FPC's rate regulation under the Natural Gas Act. This effort must fail, just as the same effort failed long ago in *Grounds*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GERALD SAWATZKY
FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202

JAY W. ELSTON
FULBRIGHT & JAWORSKI
800 Bank of the Southwest Building
Houston, Texas 77002

JOHN M. IMEL
MOYERS, MARTIN, CONWAY, SANTEE & IMEL
320 South Boston Building
Suite 920
Tulsa, Oklahoma 74103

ARLOE W. MAYNE
Ashland Oil, Inc.
1409 Winchester Avenue
P.O. Box 391
Ashland, Kentucky 41101

Attorneys for Respondent Ashland Oil, Inc.

March 28, 1980

APPENDIX

Section 4 of the Natural Gas Act, 52 Stat. 822; 76 Stat. 72, 15 U.S.C. Sec. 717c, subsections (a), (b), & (c), provide:

"(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

Section 11 of the Helium Act, 74 Stat. 922, 50 U.S.C. Sec. 167i, provides:

> The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 717c and 717d of Title 15, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.